

Claimant suffered a series of work-related injuries to his upper extremities, including bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome and right tennis elbow. In his October 14, 2004 Award, the ALJ averaged the opinions of Dr. John B. Moore and Dr. Sergio Delgado, and determined claimant suffered a 16 percent whole person

functional impairment. The percentage of functional impairment is not an issue on appeal. Therefore, the Board affirms the ALJ's finding of a 16 percent permanent impairment of function. The ALJ further found claimant made a good faith effort to find employment and, therefore, was entitled to a work disability based upon his actual wage loss. The ALJ found claimant had a 100 percent wage loss from April 1, 2003, when he was released from treatment until May 1, 2004, when he became employed part-time resulting in a 78.3 percent wage loss.

The ALJ was not persuaded that the opinion of either physician was more credible or that one should be given more weight than the other with regard to task loss. He further determined that if their opinions were either averaged, or if Dr. Delgado's opinions are adopted with the exception of the two tasks excluded due to heavy lifting, the outcome is the same, i.e. a 28.5 percent task loss. The ALJ averaged the 28.5 percent task loss with the 100 percent wage loss for a 64.25 work disability. When the 28.5 percent task loss is averaged with the 78.3 percent wage loss the result is a 53.4 percent work disability. The total disability award is capped at the \$100,000 statutory maximum.¹

Claimant was paid temporary total disability (TTD) compensation for the period November 21, 2002 through January 16, 2003. The ALJ determined claimant is entitled to additional TTD compensation for the period of April 16, 2002, through November 20, 2002, as respondent was unwilling to provide accommodated employment for claimant, and because claimant was not at maximum medical improvement.

Respondent does not dispute the ALJ's finding of a 28.5 percent task loss but does dispute the ALJ's finding of good faith and that claimant's actual wage loss is 78.3 percent. Respondent argues claimant was working post injury 54 hours a week earning \$298.50. When compared to the claimant's stipulated pre-injury average weekly wage of \$681.00, this results in a 56 percent wage loss as opposed to the 78.3 percent wage loss awarded by the ALJ. Based upon a task loss of 28.5 percent and a wage loss of 56 percent, respondent argues that claimant's work disability is 42.25 percent instead of the 53.4 percent found by the ALJ.

Respondent also contends that for the period of April 16, 2002 to November 20, 2002, there is no medical evidence claimant was on restrictions and, therefore, he should not be awarded the additional TTD. Furthermore, claimant did not request this additional TTD in his submission letter to the ALJ.

Claimant argues that Dr. Delgado's work task loss opinion of 57 percent is more credible and accurate than Dr. Moore's zero percent task loss opinion. And that the Board should therefore modify the ALJ's Award by finding claimant had a 67.65 percent work disability based on a work task loss of 57 percent averaged with a 78.3 percent wage loss.

¹ K.S.A. 44-510f.

As for the issue of his entitlement to TTD for the period beginning April 16, 2002 and ending November 20, 2002, claimant acknowledges that he withdrew his request for that period of TTD in his October 1, 2004 submission brief to the ALJ and, therefore, it should not have been awarded.

The nature and extent of claimant's disability and whether claimant should have been awarded TTD for the time period of April 16, 2002, the last day claimant worked for respondent, to November 20, 2002, are the only issues before the Board.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Claimant last worked for respondent on April 16, 2002. He was terminated as a result of his work-related injuries and restrictions. He thereafter received additional medical treatment and was ultimately released by Dr. Moore as having reached maximum medical improvement on April 1, 2003. Claimant, post-injury, worked part-time from May 1, 2004 to August 2, 2004 at \$5.15 per hour for approximately 30 hours per week which amounts to an average weekly wage of \$154.50 (\$5.15 per hour x 30). The first two weeks claimant worked 18 hours, 53.75 hours the next two weeks, and the third two-week pay period he worked 63.25 hours.² Thereafter, Claimant had temporary employment from August 3, 2004 to September 13, 2004 at \$253 per week. At the end of this temporary employment claimant went back to his part-time employment. The Board agrees with the ALJ's finding that claimant made a good faith effort to find employment post accident. Therefore, claimant's actual post-injury earnings should be utilized to determine his wage loss. Comparing the claimant's post accident weekly earnings of \$154.50 to the stipulated average weekly wage of \$681.00 results in a 77.3 wage loss not 78.3 percent as found by the ALJ. In addition, the additional period of TTD compensation awarded by the ALJ should be disallowed, as it was not requested and was not an issue presented for the ALJ's determination. The Board otherwise approves and adopts the findings and conclusions of the ALJ.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of October 14, 2004, entered by Administrative Law Judge Bryce D. Benedict should be and is hereby, modified as follows:

The claimant is entitled to 8.14 weeks of temporary total disability compensation at the rate of \$417 per week or \$3,394.38 followed by 219.54 weeks of permanent partial disability compensation at the rate of \$417 per week or \$91,548.18 for a 52.9 percent work disability, making a total award of \$94,942.56.

² R.H. Trans., Ex. 1.

As of May 23, 2005, there would be due and owing to the claimant 8.14 weeks of temporary total disability compensation at the rate of \$417 per week in the sum of \$3,394.38 plus 153.72 weeks of permanent partial disability compensation at the rate of \$417 per week in the sum of \$64,101.24 for a total due and owing of \$67,495.62, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$27,446.94 shall be paid at the rate of \$417 per week for 65.82 weeks or until further order of the Director.

The other orders of the ALJ are hereby adopted by the Appeals Board as if fully set forth herein.

IT IS SO ORDERED.

Dated this _____ day of May 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
John M. Graham, Jr., Attorney for Respondent and Liberty Mutual Ins. Co.
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director